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No. 87-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WCLR RADIO STATION,
a Division of Bonneville International Corporation,
Petitioner

v.

LEO J. RENGERS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

		Page
I.	The Seventh Circuit's Definition Of Willfulness Is Inconsistent With The Standard Established In *Thurston* And Used By Other Courts Of Appeals	1
II.	The Seventh Circuit's Approach Does Not Preserve The Two Tiers Of Liability Mandated By *Thurston*	6
III.	Petitioner Is Entitled To A Retrial Of The Punitive Damages Issue Before A Properly Instructed Jury	10

TABLE OF AUTHORITIES

CASES — Page

Bethea v. Levi Strauss & Co., 827 F.2d 355 (8th Cir. 1987) 6, 10
City of Springfield v. Kibbe, 107 S.Ct. 1114, 1121 (1987) 2
Coston v. Plitt Theatres, Inc., Nos. 86-2109, 86-2137, 86-2144 (September 23, 1987), *reh'g en banc denied* (7th Cir. October 28, 1987) 1, 2, 3, 8, 9
Darby v. United States, 132 F.2d 928 (5th Cir. 1943) 5
Dreyer v. Arco Chemical Co., 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 1348 (1987) 9-10
Furr v. AT&T Technologies, Inc., 824 F.2d 1537 (10th Cir. 1987) 5
Garrison v. Louisiana, 379 U.S. 64 (1964) 1
Gilliam v. Armtex, Inc., 820 F.2d 1387 (4th Cir. 1987) 10
Kossman v. Calumet County, 800 F.2d 697 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1294 (1987) 3
LaMontagne v. American Convenience Products, Inc., 750 F.2d 1405 (7th Cir. 1984) 6, 8
McNeil v. Economics Laboratory, Inc., 800 F.2d 111 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1983 (1987) 3, 8, 9
Nabob Oil Co. v. United States, 190 F.2d 478 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951) 5
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 1
Nolting v. Yellow Freight System, Inc., 799 F.2d 1192 (8th Cir. 1986) 4, 5
Powell v. Rockwell International Corp., 788 F.2d 279 (5th Cir. 1986) 4
Syvock v. Milwaukee Boiler Manufacturing Co., 665 F.2d 149, 156 n.10 (7th Cir. 1981) 7, 8
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) ..... *passim*
United States v. Illinois Central R. Co., 303 U.S. 239 (1938) 5
United States v. Murdock, 290 U.S. 389 (1933) 5

TABLE OF AUTHORITIES—Continued

	Page
United States Postal Services v. Aikens, 460 U.S. 711 (1983)	6
Whitfield v. City of Knoxville, 756 F.2d 1429 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 1199 (1986)	5, 7
MISCELLANEOUS	
Restatement (Second) of Torts (1965)	2, 3
§ 283	3
§ 290	2
§ 501, comment a	2
§ 908, comment b	2
§ 908(2)	2
W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* (5th ed. 1984)	2

REPLY BRIEF FOR PETITIONER

I. The Seventh Circuit's Definition Of Willfulness Is Inconsistent With The Standard Established In *Thurston* And Used By Other Courts Of Appeals

Respondent does not dispute that the Seventh Circuit's definition of willfulness differs from that approved by this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and from that used by "every other circuit addressing willfulness in ADEA disparate treatment cases." *Coston v. Plitt Theatres, Inc.*, Nos. 86-2109, 86-2137, 86-2144 (September 23, 1987), *reh'g en banc denied* (7th Cir. October 28, 1987), slip op. at 31 (Manion, J., concurring in part). Instead, respondent contends that the difference is only a "language difference[]" which does not give rise to any true conflict. Response to Petition 4 (hereafter "Resp."). Thus, respondent's principal argument rests on the premise that there is no legal difference between a standard which imposes liability for actions which the actor "reasonably should have known" were wrongful (the standard used by the Seventh Circuit) and one which imposes liability only when the actor "showed reckless disregard" for whether his actions were wrongful (the standard used by this Court and other courts of appeals). That premise is unsupportable.

The law has consistently distinguished between actions which the actor "reasonably should have known" are wrong and those which evidence a "reckless disregard" for the matter. For example, a media defendant sued for libel by a public figure is liable only if it either knew the libelous statement was false or acted in "reckless disregard" of that fact. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). A media defendant is not liable to a public figure for a statement it "reasonably should have known" was false. *See Garrison v. Louisiana*, 379 U.S. 64, 79 (1964) ("[t]he reasonable-belief standard . . . is not the same as the reckless-disregard-of-truth standard"). Similarly, a tort defendant who acts "recklessly" may have liability imposed upon him which

the law would find too extreme had he merely acted negligently, *i.e.*, "unreasonably." Restatement (Second) of Torts § 501, comment a (1965); *City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1121 (1987) (O'Connor, J., dissenting).

More importantly, the distinction between acts which were wrong merely because the actor reasonably should have known that they were wrong and those which evidence reckless disregard for that matter has traditionally been the dividing line for punitive damages liability. Conduct which gives rise to liability merely because the actor reasonably should have known that it would cause harm constitutes negligence. *See* Restatement (Second) of Torts § 290 (1965) (defendant's failure to know facts which he should know gives rise to negligence liability). It is well established that "[p]unitive damages are not awarded for [acts] which constitute ordinary negligence." *Id.*, § 908, comment b (1979). *Accord*, W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 2, p. 10 (5th ed. 1984). On the other hand, acts which demonstrate reckless disregard warrant punitive damages. *See* Restatement (Second) of Torts § 908 (2) (1979) (punitive damages awardable for "conduct that is outrageous because of defendant's . . . reckless indifference to the rights of others").

Because "[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature" (*Thurston*, 469 U.S. at 125), the difference between a "reasonably should have known" standard and a "reckless disregard" standard is clearly not one of mere semantics. As one Seventh Circuit judge observed, because "[t]he law has always made a large distinction between negligent and reckless conduct particularly regarding the award of punitive damages," the conflict between the Seventh Circuit's standard and that used by every other court can be eliminated only by the "adoption of a novel theory." *Coston*, slip op. at 31-32 (Manion, J., concurring in part). Neither respondent

nor the Seventh Circuit has offered any justification for adopting such a novel theory.[1]

Of equal significance to this petition is the fact that other courts of appeals have expressly rejected the argument that the "reasonably should have known" standard is identical to the "reckless disregard" standard for ADEA purposes, a fact which even the Seventh Circuit has acknowledged. *Coston*, slip op. at p. 9 n.1; App. A 11a.[2] It is undeniable that the instruction approved by

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[1] Apparently recognizing that the distinction between negligence and recklessness in the punitive damages context is well-established, respondent asserts that the Seventh Circuit's "reasonably should have known" standard does not equate willfulness with mere common law negligence. Resp. 9. That assertion, however, is undermined by the Seventh Circuit's use of the term "common law negligence" in describing an acceptable definition of willfulness (App. A at 11a), and also by its explanation of how the standard should be applied. *Id.* at 12(a) (emphasis added) (an employer acts willfully when he is "not acting *reasonably*," *or* when he is "*unreasonably* ignorant of the law"). Reasonableness is the well accepted standard for determining common law negligence. Restatement (Second) of Torts § 283 (1965). It is therefore not surprising that one Seventh Circuit judge has acknowledged that the standard adopted by that court "only requires negligence as a threshold for finding willfulness." *Coston*, slip op. at 31 (Manion, J., concurring in part).

[2] Respondent contends that the Seventh Circuit has carefully considered whether its "reasonably should have known" standard is consistent with *Thurston*'s "reckless disregard" standard. Resp. 7, 8. This contention is both partially inaccurate and completely irrelevant. Contrary to respondent's assertion, neither *McNeil v. Economics Laboratory Inc.*, 800 F.2d 111 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1983 (1987), nor *Kossman v. Calumet County*, 800 F.2d 697 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1294 (1984), contain any "extensive" analysis of whether the two standards are similar. Resp. 8. Instead, the court articulated *both* standards and then applied the *Thurston* standard without any consideration of whether the two were consistent. *See Kossman*, 800 F.2d at 700 (lower court finding that actions were not willful is reversed because "the district court . . . failed to consider whether the County 'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA' "); *McNeil*, 800 F.2d at 117 (lower court finding that actions were not willful is sustained

the Seventh Circuit in the present case has been expressly disapproved by other circuit courts of appeals. *Powell v. Rockwell International Corp.*, 788 F.2d 279, 286 (5th Cir. 1986); *Nolting v. Yellow Freight System, Inc.*, 799 F.2d 1192, 1197 (8th Cir. 1986). Therefore, a litigant's right to challenge an instruction like that given in the present case currently depends on the location of the trial. Rule 17.1(a), Rules of the Supreme Court of the United States, recognizes that this Court should act to eradicate such geographical disparity.

In tacit recognition of the conflicts noted above, respondent also asserts that the Seventh Circuit has merely joined other courts of appeals in accepting this Court's invitation to adopt any of several standards of willfulness, including ones which are "less strict" than the "knowing or reckless disregard" standard approved in *Thurston*. Resp. 5, 10, 11. This submission is erroneous for two reasons.

First, no such invitation was made in *Thurston*. Nothing in *Thurston* indicates that lower courts are free to adopt a less strict willfulness standard. In concluding that the Second Circuit's standard was acceptable, the *Thurston* Court merely indicated that willfulness could be established by showing that there was *either* a knowing violation *or* reckless disregard.[3] The Court did not

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because the finding was "not clearly erroneous, especially in light of *Thurston*"). In fact, the employee in *McNeil* sought review in this Court because the Seventh Circuit *failed* to apply the less strict standard it applied in the present case. Petition for Certiorari No. 86-1466 at 18-19. Moreover, the fact that the Seventh Circuit has concluded that the two standards are consistent does not demonstrate that review is inappropriate here. On the contrary, this erroneous conclusion (which other courts have expressly rejected) creates a conflict requiring the Court's attention.

[3] Contrary to respondent's assertion (Resp. 9), petitioner does not contend that a showing of evil motive is required in order to establish a willful violation. Such a showing would suffice because it would establish a knowing violation of the ADEA. However, a showing of reckless disregard would also be sufficient. *See* Pet. 12 n.9.

authorize any further lessening of the standard. Indeed, by concluding that the "in the picture" standard was inappropriate (*Thurston*, 469 U.S. at 127-128), the Court "specifically rejected a lesser burden of proof of willfulness in this context." *Nolting*, 799 F.2d at 1198 n.9. The other standards to which the *Thurston* Court referred by analogy all require either reckless or intentional misconduct as opposed to mere unreasonableness. *United States v. Murdock*, 290 U.S. 389, 395 (1933) ("careless disregard"); *United States v. Illinois Central R. Co.*, 303 U.S. 239, 243-44 (1938) ("disregard of the statute and indifference to its requirements"); *Nabob Oil Co. v. United States*, 190 F.2d 478, 479 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951) ("wholly disregards"); *Darby v. United States*, 132 F.2d 928, 930 (5th Cir. 1943) ("purposefully and deliberately evades the Act").

Second, no court other than the Seventh Circuit has approved a less strict standard. As noted below, three circuits now apply a standard *more* strict than "knowing or reckless disregard" in individual discrimination suits. Note 10, *infra*. Neither of the other two decisions cited by respondent (Resp. 11), moreover, authorize the application of a *less* strict standard. In *Whitfield v. City of Knoxville*, 756 F.2d 455, 464 (6th Cir. 1985), the court merely held that, because defendants' actions did not satisfy the lower "reasonableness" standard, they could not have violated the stricter "reckless disregard" standard.[4] In *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537 (10th Cir. 1977), the court ruled that even though the instruction to the advisory jury (given before *Thurston*) was somewhat unclear, the judge, who made the willfulness determination, "had read the *Thurston* decision, which states a *clear standard*, at the time [he] made [his] decision on willfulness." *Id.* at 1546 (emphasis

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[4] 756 F.2d at 464 ("Since the defendants [acted] reasonably and in good faith, they could not, by definition, have acted with reckless disregard for whether the ADEA applied") (emphasis added).

added). This is hardly an approval of a standard less strict than that adopted in *Thurston*.

II. The Seventh Circuit's Approach Does Not Preserve The Two Tiers Of Liability Mandated By *Thurston*

Respondent asserts that the Seventh Circuit's negligence standard adequately preserves the two-tiered liability scheme mandated by Congress and this Court's decision in *Thurston* because "unconscious" violators and those who transgress the ADEA "in complete good faith" escape punitive damages. Resp. 6, 9. Alternatively, he suggests that the court of appeals properly applied *Thurston* to this case. Resp. 12. The "unconscious violator" and "good faith" submissions tax credulity, and respondent's reliance on *Thurston* is flatly erroneous.

To prevail on a claim of individual discrimination under the ADEA, a plaintiff must establish intentional, age-related animus on the part of the defendant. "As the Supreme Court has said, the 'ultimate factual issue' in cases such as this is whether the employer intentionally discriminated against the employee." *Bethea v. Levi Strauss & Co.*, 827 F.2d 355, 357 (8th Cir. 1987) (*quoting United States Postal Service v. Aikens*, 460 U.S. 711, 714-715 (1983)). Indeed, the court of appeals below stressed that an ADEA plaintiff must demonstrate "'that he would not have been discharged "but for" his employer's motive to discriminate against him because of his age.'" App. A 7a (*quoting LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984)). Thus, *all* successful ADEA plaintiffs *must* establish, as part of their case in chief, conscious, intentional discrimination by the defendant. Accordingly, respondent's assertion that the lower court's standard preserves two-tiered liability (Resp. 6-7) is true only in the rudimentary sense that "unconscious" wrongdoers *escape ADEA liability altogether*. The two tiers of ADEA liability established by the decision below are (1) those defendants who lose and (2) those defendants who win.

Those tiers were assuredly not the ones the Court had in mind in *Thurston*.[5]

Respondent's suggestion that the lower court's negligence standard is consistent with *Thurston* because it exonerates "complete good faith" violators (Resp. 9) is no more persuasive. For the reasons just noted, a plaintiff who succeeds in establishing the intentional, age-related animus necessary to prevail on an individual discrimination claim will have rebutted any "complete good faith" defense. While, as noted in the petition (at 17-19), a "good faith" argument might be made in cases such as *Thurston*, which involve a disparate impact challenge to widely applicable employment policies,[6] successful individual discrimination claims simply foreclose such an assertion. As the Seventh Circuit itself has emphasized, "[w]here the meaning of the ADEA is debatable," as it often is in disparate impact cases,[7] "an employer's reasonable and good faith construction of the statute's

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[5] That the lower court's approach results in automatic double damages liability is demonstrated by respondent's own presentation. In defending the negligence standard adopted below, respondent quotes the court of appeals' assertion in *Sycock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149, 156 n.10 (7th Cir. 1981), that " '[i]n a disparate treatment case, a finding of willfulness will generally require some direct evidence of discriminatory intent toward the plaintiff or a showing that, at the time of the alleged discriminatory action, the employer was motivated to discriminate or engaged in a pattern of discriminating against older employees.' " Resp. 7 (*quoting id.*). Such a showing does not go beyond the showing that must be made to prevail in the first instance. App. A 7a (plaintiff must show that " 'he would not have been discharged "but for" his employer's motive to discriminate against him because of his age' "). Under the Seventh Circuit's standard, therefore, successful individual ADEA claimants are rewarded with a reflexive award of punitive damages.

[6] *See Whitfield v. City of Knoxville*, 756 F.2d 455 (6th Cir. 1985) (although ADEA invalidates city policy requiring mandatory retirement of public safety officers, good faith belief that ADEA could not constitutionally be applied to the city precludes liquidated damages).

[7] *See Whitfield v. City of Knoxville, supra.*

requirements, even if erroneous, cannot be considered willful." *Coston*, *supra*, slip op. at 10. However, where "no debatable requirement of the ADEA [is] at issue," as is the case with individual discrimination claims, "there is no possibility" for a defendant to argue that his actions were "a reasonable construction . . . of the ADEA." *Id.* Thus, respondent's "good faith" argument, like his "unconscious violator" submission, fails to provide any foundation for a second tier of ADEA liability in individual discrimination cases.[8]

Recognizing the frailty of his assertion that the court of appeals' negligence standard is consistent with a two-tiered liability scheme, respondent submits that the lower court properly "evaluated the jury's finding of willfulness in light of *Thurston*." Resp. 3, 12-13. But, as set out in the petition (at 19-21), the court of appeals' application of *Thurston* flies directly in the face of that decision. The court of appeals concluded that, because petitioner admitted its knowledge of the ADEA and the jury found intentional discrimination, the violation was—without more—"willful." App. A 13a n.5. Respondent's repetition of that argument (Resp. 12-13) cannot avoid

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[8] Citing *McNeil*, *supra*, and *Syvock*, *supra*, respondent argues that the Seventh Circuit's standard adequately preserves a second tier of liability because punitive damages were not awarded in those cases. Resp. 12. The assertion will not withstand analysis. In *Syvock*, the court of appeals found that the defendant was an "unconscious" violator. 665 F.2d at 157. In light of the Seventh Circuit's more recent pronouncement that an ADEA plaintiff must show that "he would not have been discharged 'but for' his employer's motive to discriminate against him because of his age" (*LaMontagne*, *supra*, 750 F.2d at 1409), future "unconscious" violators simply will not be found liable in the first instance. *McNeil* similarly does not support respondent's contention. Although the Seventh Circuit there sustained a judge's finding that the violation was not willful, the court noted that the "finding . . . is not clearly erroneous, especially in light of *Thurston*." 800 F.2d at 117. Thus, it is probable that the denial of liquidated damages in *McNeil* rested upon the court of appeals' conclusion that the evidence did not meet *Thurston*'s "knowing or reckless disregard" standard. *Id.* *See* note 2, *supra*.

the plain fact that this Court has rejected the claim that a violation of the ADEA is willful anytime the employer knew the Act was potentially applicable. *Thurston*, 469 U.S. at 127. Judge Manion of the Seventh Circuit has criticized his own court precisely because "[t]he Supreme Court has emphasized that willfulness is not established merely by showing that the ADEA was violated and that the employer *knew* of the ADEA." *Coston, supra*, slip op. at 32 (Manion, J., concurring in part) (emphasis in original).[9]

The lower court's disturbing interpretation of *Thurston* raises an issue not addressed by respondent: the potential that the "knowing or reckless disregard" standard can be applied in a manner which results in automatic double damage liability despite this Court's clear instructions to the contrary. *Thurston*, 469 U.S. at 128. That potential has plainly been fulfilled here. As noted in the petition (at 17-21 and i, question 2), this issue alone merits review. To avoid the result manifested in this case, three circuits now require evidence of outrageous behavior—in addition to knowing or reckless disregard—before liquidated damages can be awarded in an ADEA individual discrimination case.[10]

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[9] An earlier Seventh Circuit case relied upon by respondent (Resp. 12) implicitly *rejects* the *Coston* panel's and the instant panel's reading of *Thurston*. In *McNeil, supra*, the plaintiff argued that the "defendant's violation was willful because there was substantial evidence of discriminatory intent and [plaintiff's supervisor] admitted that he was aware that the termination of an employee on the basis of age would violate the ADEA." 800 F.2d at 117. This analysis, of course, is indistinguishable from that adopted below. App. A 13a n.5. In *McNeil*, however, the Seventh Circuit concluded that such arguments could not prevail—"especially in light of *Thurston*." 800 F.2d at 117. *See* note 2, *supra*. The Seventh Circuit has now repudiated the course taken in *McNeil* by refusing rehearing *en banc* in *Coston*. Nos. 86-2109, 86-2137, 86-2144 (7th Cir. October 28, 1987).

[10] The petition (at 21) cited cases from the Third and Fourth Circuits which had adopted the "outrageousness" requirement. *Dreyer v. Arco Chemical Co.*, 801 F.2d 651 (3d Cir. 1986), *cert.*

III. Petitioner Is Entitled To A Retrial Of The Punitive Damages Issue Before A Properly Instructed Jury

Respondent finally submits that, even if the lower court's decision "is not absolutely consistent with the guidelines in *Thurston*," any error is harmless. Resp. 13-14. The record simply will not support that assertion. As shown in the petition (at 3-4), there were numerous grounds unrelated to age which influenced respondent's termination. The trial judge concluded that these deficiencies in respondent's performance, at some point, would have resulted in respondent's lawful discharge. Indeed, the district court denied respondent's motion for front pay because "under the circumstances . . . it is highly unlikely that [respondent] would have remained employed by [petitioner] indefinitely." App. D 64a. Thus, it is probable that a properly instructed jury—informed that a willful violation requires a showing of knowing or reckless disregard—would *not* have found a willful violation. Petitioner is plainly entitled to a retrial of the willfulness issue before a properly informed finder of fact.

CONCLUSION

The petition for a writ of certiorari should be granted.

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denied, 107 S.Ct. 1348 (1987); *Gilliam v. Armtex, Inc.*, 820 F.2d 1387 (4th Cir. 1987). Counsel for petitioner have since learned that the Eighth Circuit has also adopted an "outrageousness" requirement. *Bethea v. Levi Strauss & Co.*, 827 F.2d 355, 359 (8th Cir. 1987) (because "'[t]he essence of punitive damages is that they may be awarded "for conduct that is *outrageous*,"'" there "must be some additional evidence [of outrageousness]" to meet the standard articulated in *Thurston*) (*quoting Dryer v. Arco Chemical Co., supra*, 801 F.2d at 657-658).

Respectfully submitted,

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